STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2008
v	No. 275911 Oakland Circuit Court
JERMAINE CURTIS BRANNER, Defendant-Appellant.	LC No. 2006-209376-FH

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession of marijuana, MCL 333.7403(2)(d). The parties stipulated to allow the trial court to decide the case based on the preliminary examination testimony and other documentary evidence. The court found defendant guilty of both charges. Defendant appeals as of right. We affirm.

After receiving a tip from a confidential informant, who had proven to be reliable in the past, the police set up surveillance at a gas station in Pontiac. The informant indicated that defendant would be arriving at the gas station at a specified time to deliver narcotics. The informant provided a description and license plate number of the vehicle, which the police confirmed was registered to defendant. Defendant's vehicle arrived at the gas station at the appointed time and momentarily stopped at the gas pumps before exiting the station. The police subsequently stopped defendant's vehicle. Defendant was ordered to get out of the vehicle. A police officer observed a package of suspected cocaine fall from defendant's lap as he was getting out of the car. Defendant was then placed under arrest and his vehicle was searched. Additional amounts of cocaine and marijuana were found in the vehicle. A laboratory analysis of some of the substances seized revealed 68.14 grams of cocaine and 2.35 grams of marijuana.

I. Issues Raised by Appellate Counsel

Defendant first argues that the district and circuit courts erred in denying his motion to suppress the evidence seized from his vehicle. We disagree. "A trial court's findings of fact in a suppression hearing are reviewed for clear error; but its ultimate decision on a motion to suppress is reviewed de novo." *People v Dunbar*, 264 Mich App 240, 243; 690 NW2d 476 (2004). This Court reviews de novo whether the Fourth Amendment was violated and if an exclusionary rule applies. *People v Fletcher*, 260 Mich App 531, 546; 679 NW2d 127 (2004).

Initially, we reject defendant's argument that the circuit court erred by failing to conduct an evidentiary hearing and instead relying on the preliminary examination testimony and police reports to decide this issue. Although our Supreme Court in *People v Talley*, 410 Mich 378, 382, 390 n 3; 301 NW2d 809 (1981), disapproved of the practice of relying on preliminary examination testimony when ruling on a motion to suppress evidence, the Court subsequently clarified in *People v Kaufman*, 457 Mich 266, 275-276; 577 NW2d 466 (1998), that *Talley* does not apply when the parties stipulate to the use of a preliminary examination record and a police report to decide a suppression motion. See, also, MCR 6.110(D). Because defendant stipulated to the circuit court's use of the preliminary examination testimony and police reports to decide the motion to suppress, the circuit court was not required to conduct an evidentiary hearing.

According to the testimony and police reports, the decision to stop defendant's vehicle was based on information received from a confidential informant. That information was received approximately 20 minutes before defendant's vehicle was stopped, so the police did not have sufficient time to obtain a warrant. Therefore, the prosecution was required to show that the circumstances fit within an exception to the warrant requirement. See *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

Under *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968), police officers are constitutionally permitted to make warrantless investigative stops if they

> satisfy the two-part test set forth in *United States v Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. *Id*. at 418. That suspicion must be reasonable and articulable, *Terry* at 21, and the authority and limitations associated with investigative stops apply to vehicles as well as people. *United States v Sharpe*, 470 US 675, 682; 105 S Ct 1568; 84 L Ed 2d 605 (1985). [*People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993) (footnote omitted).]

In determining whether an officer's suspicion for making a stop was reasonable, articulable, and particular, "[c]ommon sense and everyday life experiences predominate over uncompromising standards." *Id*. at 635-636. Deference should be given to the officer's experience and the patterns of certain types of lawbreakers. *Id*. at 636. "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). The police were only required to possess a reasonable and articulable suspicion that crime was afoot to make the initial stop of defendant's vehicle. See *Dunbar*, *supra* at 246.

Defendant principally argues that the information supplied by the confidential informant did not justify the stop and search of his vehicle. We disagree. As this Court explained in *Dunbar*, *supra* at 248,

> when an investigatory stop is based, at least in part, on information from an informant, the critical inquiry remains whether the officer's suspicion was reasonable when considered in light of the totality of circumstances. *People v Tooks*, 403 Mich 568, 575-576; 271 NW2d 503 (1978). Part of this

> reasonableness inquiry includes considering the reliability of the informant's information. In *id*. at 577, our Supreme Court set forth three factors that a court should examine when making this determination: "(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors." [Footnotes omitted.]

See, also, *People v Faucett*, 442 Mich 153, 165, 169; 499 NW2d 764 (1993).

Contrary to what defendant argues, the reliability of the informant was not based solely on the officer's testimony that the informant had proven to be reliable in the past. The informant's reliability was also established by independent police investigation, which confirmed the information provided by the informant. The informant gave defendant's name, license plate number, and model of his vehicle. The police verified that such a vehicle was registered to defendant. The informant also provided information on where defendant would be at a specific time, the accuracy of which was verified when the police set up surveillance and observed defendant's vehicle arrive at the specified gas station at the appointed time. Defendant's conduct when arriving at the gas station—driving up to the gas pumps and then driving off without conducting any business—added to the level of suspicious activity under the totality of the circumstances. Given the nature of the information provided by the informant, the informant's past history of reliability, the fact that the police were able to independently confirm the reliability and accuracy of many of the details provided by the informant, and defendant's suspicious conduct of arriving at the gas station and then quickly leaving without conducting any business, the police had a reasonable, articulable basis for believing that defendant was involved in drug activity. Accordingly, they were justified in conducting a *Terry* stop of defendant's vehicle. Although defendant asserts that there was a passenger in his vehicle, which the informant did not mention to the police, that fact did not discredit the reliability of the informant's information.

Once the police initiated the *Terry* stop, they were entitled to conduct a limited patdown search for weapons if they reasonably believed that defendant might be armed and posed a danger to the police or others. *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). According to the police report, the informant told the police that defendant was usually armed with a handgun when he engaged in drug transactions. Therefore, the police had reason to believe that defendant might be armed and, accordingly, could properly order him out of the vehicle to conduct a patdown search for weapons for their safety. According to the testimony, a suspected rock of cocaine fell from defendant's lap as he was exiting the vehicle. At this point, the police had probable cause to arrest defendant for possession of cocaine and the subsequent search of the passenger compartment of his vehicle was proper as a search incident to defendant's arrest. See *Champion*, *supra* at 115. For these reasons, the circuit and district courts did not err in denying defendant's motion to suppress the evidence.

Defendant next argues that trial counsel was ineffective for failing to conduct a reasonable investigation of the case and for failing to call James Fountain and Officer Moon as

witnesses. Fountain was a passenger in defendant's vehicle at the time of his arrest and Moon was the officer who ordered defendant out of his car. Because this issue was not raised in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to errors apparent from the record. See *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

The record does not support defendant's ineffective assistance of counsel claim because there is no record of Fountain's and Officer Moon's proposed testimony. At most, defendant would only be entitled to a remand for further development of the record. In support of his request for a remand, defendant offers only the affidavit of his appellate attorney regarding what she believes Fountain's testimony would be if he were called as a witness. However, no affidavit from Fountain has been provided. Further, appellate counsel's affidavit does not explain the basis for her belief that Fountain would testify in the manner indicated and fails to indicate that she even spoke to Fountain. Appellate counsel's affidavit also fails to mention anything about Officer Moon's proposed testimony. Moreover, the affidavit does not address whether either of the witnesses was ever contacted by trial counsel or provided any information to counsel. Under the circumstances, we conclude that appellate counsel's affidavit fails to provide competent factual support for defendant's claim that these witnesses could have provided favorable testimony, or that trial counsel was ineffective for failing to reasonably investigate the case. Therefore, a remand for an evidentiary hearing is not warranted.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

II. Issues Raised in Defendant's Standard 4 Brief

Defendant challenges certain findings of fact made by the trial court. A trial court's findings of fact at a bench trial may not be set aside on appeal unless they are clearly erroneous. MCR 2.613(C); *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. We review questions of law de novo. *Id*.

Defendant was charged with possession with intent to deliver 50 or more but less than 450 grams of cocaine. To convict him of this charge, the prosecution was required to prove

> (1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it. [*People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).]

Defendant was also convicted of possession of marijuana. To establish that offense, the prosecution was required to prove (1) that the substance was marijuana, (2) that defendant was not authorized to possess it, and (3) that defendant knowingly possessed it. See CJI2d 12.5.

Defendant asserts that the trial court inaccurately stated that "[t]he facts in this matter are not in dispute." Viewed in context, this comment was merely intended as an acknowledgement that the parties had agreed on the record that was to serve as the basis for the court's decision. We find no error. Further, we find no merit to defendant's argument that it was improper for the trial court to refer to observations made by Officer Moon, who did not testify at the preliminary examination. The parties stipulated that the trial court could consider the preliminary examination testimony and the police reports to decide this case and statements regarding Moon's involvement and observations are mentioned in those items. A defendant may not claim error on appeal to something his attorney deemed proper at trial because to do so would allow him to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Similarly, because the parties stipulated to the record on which the trial court was to decide this case, the prosecution was not required to call other officers involved, including Officers Marougi, Wood, and Main.

Defendant also argues that the trial court erred in finding that Officers Marougi, Wood, and Hembree searched the interior of defendant's vehicle and found the suspected narcotics there. Support for this finding can be found in Officer Hembree's police report in which he stated, "Officer Marougi, Wood and I approached the passenger's side of Branner's vehicle," and that "[o]fficers then began to search the interior of the Aztec" after the passenger was taken into custody. It is apparent, however, that Officer Locricchio was also involved in the search. In any event, the identity of the particular officers involved in the search was not significant to the outcome of the case. As previously explained, the fact that many of the officers did not testify about the search does not require reversal in light of defendant's stipulation that the trial court could decide the case on the preliminary examination testimony and other documentary evidence that was submitted.

And there is no merit to defendant's argument that only the quantity of drugs discovered by Officer Janczarek could be considered by the trial court, because he was the only officer who testified regarding the search. The evidence discovered by other officers was the subject of the police reports and toxicology reports, which the parties stipulated could be considered by the trial court. In addition, Officer Locricchio testified that he found substantial amounts of cocaine during his search of the vehicle, totaling well over 50 grams. The toxicology report revealed the presence of at least 68.14 grams of cocaine. Thus, the trial court did not clearly err in finding that defendant possessed 50 or more grams of cocaine. The police report also indicated that Officer Locricchio recovered suspected marijuana from the driver's side door panel, and the toxicology report indicated the presence of 2.35 grams of marijuana. Thus, the evidence also supported the trial court's findings that defendant possessed marijuana.

We also reject defendant's argument that the trial court violated his constitutional right of confrontation by considering hearsay statements by nontestifying police officers. Regardless of whether the statements would be inadmissible under *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), reversal is not warranted because defendant stipulated that the evidence could be considered by the trial court. See *Green, supra*. We similarly reject defendant's alternative argument that trial counsel was ineffective for agreeing to allow the court to consider statements attributed to other officers. Had counsel not stipulated to the trial court's consideration of the evidence, the prosecutor could have called the officers to testify regarding the substance of their statements. The decision whether to allow the evidence to be presented through the officers' live testimony or through the documentary evidence that was submitted to the court was a matter of trial strategy. Defendant has not overcome the strong presumption that counsel exercised sound trial strategy. See *Davis, supra*.

Defendant also argues that defense counsel was ineffective for waiving defendant's appearance during a portion of the preliminary examination. We disagree.

A defendant has a constitutional right to be present during any stage of trial where his substantial rights might be adversely affected, US Const, Am XIV. *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998). A valid waiver of this right cannot be presumed from a silent record. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995); *People v Lonetta Williams*, 196 Mich App 404, 407; 493 NW2d 277 (1992). This case is unusual because although it involves defendant's absence during a portion of the preliminary examination, that hearing later served as the trial record. Nonetheless, defendant's absence does not require reversal.

The test for whether a defendant's absence from a portion of trial requires reversal is whether there was any reasonable possibility that the defendant was prejudiced by his absence. *Armstrong, supra*. In this case, no substantive evidence was presented during the brief period of defendant's absence. Rather, the parties merely presented legal arguments to the trial court. Because there was no reasonable possibility that defendant was prejudiced by his absence during this brief portion of the hearing, defense counsel was not ineffective for waiving defendant's presence.

Defendant also argues that he did not validly waive his right to a jury trial. A trial court's determination that a defendant validly waived his right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). Whether the trial court

complied with MCR 6.402 involves a question of law, which we review de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

Before a trial court may accept a valid jury waiver, it must comply with the requirements of MCR 6.402(B). *People v Mosly*, 259 Mich App 90, 93; 672 NW2d 897 (2003). MCR 6.402(B) provides:

> **(B) Waiver and Record Requirements**. Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

However, failure to strictly comply with MCR 6.402(B) does not require reversal if the record establishes that the defendant understood that he had a right to a jury trial and voluntarily chose to waive that right. *Mosly*, *supra* at 96.

Although the trial court did not personally address defendant to ascertain that he understood his right to a jury trial, the required questioning and advice was performed on the record by defense counsel, in the court's presence. The court also failed to state on the record that defendant had voluntarily and understandingly waived his right to a jury trial. However, defendant's responses to defense counsel's questions demonstrate that defendant understood that he had a right to a trial by jury and was voluntarily waiving that right. Defendant also executed a written waiver of his right to a jury trial, which further indicates that defendant was informed of his right to a jury trial and voluntarily agreed to waive that right.

The record does not support any claim that defendant was induced to waive his right to a jury trial based on a belief that he would receive no more than an 18-month minimum sentence. When defendant waived his right to a jury trial, he was advised on the record that he was facing approximately 87 months in prison if convicted by the court, which was the low end of the sentencing guidelines range. The record also establishes that the prosecutor made sure that defendant understood that he was waiving his right to call witnesses by agreeing to have the case decided on the prior testimony from the preliminary examination. The prosecutor explained the consequences of the stipulation to defendant, and defendant acknowledged that he understood the stipulation. Because the record indicates that defendant understood that he had a right to a jury trial and voluntarily chose to waive that right, reversal is not required.

Defendant also argues that trial counsel was ineffective for (1) advising him to waive his right to a jury trial and (2) agreeing to allow the trial court to decide the case on a stipulated record. The decisions whether to request a bench trial or a jury trial, and whether to allow the trial court to decide the case on a stipulated record, were matters of trial strategy. Defendant has failed to overcome the presumption of sound strategy.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly